

Millennium Challenge Corporation's Shutdown Contingency Plan

September 24, 2021



Table of Contents

Overview	3
Legal Background	4
Principles of MCC's Plan	5
MCC Personnel during a Lapse in Appropriations	6
Recall of Staff and Start-up Activities	8
Endnotes	9

Overview

The Office of Management and Budget (OMB) requires all agencies to have a shutdown plan in the case of a lapse, or hiatus, in appropriations.¹ The Millennium Challenge Corporation (MCC) intends to continue operations for a limited time using available carryover administrative fund balances; however, dependent upon the length of the lapse in appropriations, available balances may be exhausted and a determination made to implement this contingency plan. This plan for the Millennium Challenge Corporation provides the legal background, overarching principles, and categories of personnel identified as excepted staff necessary to carry out an orderly agency shutdown, as well as those necessary to continue select operations (excepted activities) during an agency shutdown in conformance with applicable laws and regulations.

Of the approximately 300 staff currently in Washington, DC headquarters, and 29 staff currently stationed overseas, MCC's plan includes retaining:

- MCC's CEO and the 4 "Private Sector" Members (i.e., the non- *ex officio* members) of the Board of Directors as Senate-confirmed Presidential appointees
- 53 personnel excepted up to the duration of the shutdown, including 15 Resident Country Directors (RCDs), 3 Resident Threshold Program Directors, 35 headquarters staff, and 33 on-call personnel (22 headquarters staff and 11 overseas staff) as detailed below.

Lapse Plan Summary Overview	
Estimated time (to nearest half day) required to complete shutdown activities:	<i>1/2 day</i>
Total number of agency employees expected to be on board before implementation of the plan:	<i>329 FTEs</i>
Total number of employees to be retained under the plan for each of the following categories:	
Compensation is financed by a resource other than annual appropriations:	<i>329 FTEs*</i> <i>0 FTE **</i>
Necessary to perform activities expressly authorized by law:	<i>5 FTEs**</i>
Necessary to perform activities necessarily implied by law:	<i>52 FTEs**</i>
Necessary to the discharge of the President's constitutional duties and powers:	<i>0 FTEs</i>
Necessary to protect life and property:	<i>29 FTEs**</i>
<i>* MCC's appropriations are 'no-year'; as such, MCC will continue to operate normally during a shutdown until its carryover funds have fallen to a pre-determined level which will be reserved for emergencies.</i>	

Lapse Plan Summary Overview
<i>** When MCC's carryover funds fall to the pre-determined level, MCC will implement the lapse plan, i.e., curtail operations and reduce staffing in accordance with the following notes:</i>
Brief summary of significant agency activities that will continue during a lapse:
Administration of MCC's 5 year compacts in force – by statute, the term of these compacts cannot be extended.
Brief summary of significant agency activities that will cease during a lapse:
All other activities, including primarily development of new compact and threshold agreements and evaluation of closed compacts.

The *MCC Personnel during a Lapse* in Appropriations Section within this document provides detailed lists of personnel in each of these categories.

Legal Background

Pursuant to the Constitution and a collection of statutory provisions known as the Antideficiency Act (ADA) U.S. Government agencies have no authority to incur obligations or make expenditures that cannot lawfully be funded from existing or prior year appropriations. The ADA (31 U.S.C. §1341) prohibits all officers and employees of the federal government from making expenditures or entering into obligations in advance or in excess of available appropriations or apportionments, including employing federal personnel without payment except under certain conditions. In addition, the ADA prohibits agencies from accepting voluntary services. Certain federal personnel may be utilized for emergencies involving certain situations involving the safety of human life or the protection of property. (31 U.S.C. §1342).

MCC has the legal authority to continue its operations even during a lapse in appropriations to the extent (a) its programs are funded with appropriations that do not expire at the end of the fiscal year in which the appropriation is made, but rather remain available until expended (so called no-year funding), which have largely been obligated; and (b) sufficient “no-year” administrative expense funds appropriated in prior years that have been properly apportioned by OMB remain available. The main legal constraint to continued operations is that while MCC’s administrative expense funds are no-year appropriations, the amounts provided by Congress may be sufficient only to pay for a single year’s worth of operating costs, leaving little, if any, resources for continued operations during a lapse in appropriations. MCC relies on annually appropriated administrative funds to pay its staff and other administrative expenses. In the absence of available administrative expenses funds appropriated in prior years that have been properly apportioned by OMB remaining as carryover balances that can be used to continue paying staff during a lapse in appropriations, MCC will need to implement this plan and furlough non-excepted employees.

As a result of lapses in appropriations over the years, the Attorney General and the Department of Justice’s Office of Legal Counsel (OLC) have issued legal opinions and described circumstances under which agencies may continue highly constrained operations even when there is a lapse in appropriations

and the agency is shutdown. These legal opinions and OMB guidance set forth categories of “excepted” personnel who may continue to function during all or part of a shutdown. These consist of (a) Senate-confirmed Presidential appointees, who are not subject to the ADA; (b) personnel conducting the orderly shutdown of operations (who are temporarily excepted to perform this function); (c) pursuant to 31 U.S.C. § 1342, agency employees responsible for the safety of human life or the protection of property (who are excepted as long as the individual employee is required for the safety and/or protection of property function); (d) personnel necessary for the performance of “necessarily implied” “excepted activities,” including those associated with the continued operation of previously funded multi-year grant programs and assets (who are excepted as long as the individual employee is required to perform the identified excepted activities); and (f) personnel performing certain functions necessary to assist in the discharge of the President’s constitutional duties and powers related to the conduct of foreign relations in those countries where multi-year funded grant programs exist or are being developed (who are excepted as long as the individual employee is required to assist in the performance of such foreign relations matter).

The legal opinions discussed above make it clear that the “necessary implication” exception to the ADA would authorize MCC to require an appropriate, but limited, number of employees to work during a lapse in appropriations to oversee and administer its previously funded multi-year grant programs and assets funded with no-year appropriations. The key to this exception is that the employees must be directly connected to the continuation of the multi-year funded program, the functions they are asked to perform must be “excepted activities,” and it is demonstrated that the performance of a particular excepted activity cannot be delayed without causing significant financial loss or harm to MCC’s mission.

When employees are designated as necessary for the safety of human life or the protection of property, a similar justification is required. There must be some clear and immediate connection between the function to be performed and the safety of human life or the protection of property. In addition, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised by a delay in the performance of the function in question.

Principles of MCC’s Plan

In the event of a lapse in appropriations, MCC will continue to oversee program implementation and disburse prior program obligations, which are fully funded from prior year appropriations, to the extent quarterly project funding has been approved and excepted staff can provide sufficient oversight. This is consistent with OMB’s guidance on work that should continue during any agency shutdown following a lapse in appropriations, including “the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.” Moreover, an interruption in compact and threshold program disbursements to Millennium Challenge Accounts (MCAs) and threshold program country counterparts and their contractors/vendors could breach contract provisions and undermine ongoing projects, in particular by adding schedule and cost risks for time-constrained compacts and threshold program agreements.

Following the orderly shutdown of non-excepted operations, MCC will retain as excepted personnel throughout any lapse period the minimum number of personnel necessary to ensure the safety of human

life and protection of property, including grant assets overseas, and to provide essential oversight of existing compacts and threshold programs, but only to the extent that failure to provide oversight of the particular activities will cause significant financial loss or harm to MCC's mission.

In addition, MCC's excepted personnel will need to include the Resident Country Director (or Team Leader) in each of our existing compact countries, and the program director for any MCC-managed threshold program (subject to State Department concurrence on excepted personnel at overseas missions) given their critical oversight role for MCC's previously funded multi-year grant programs and assets, and to perform MCC's corollary responsibility to assist in the discharge of the President's constitutional duties related to the conduct of foreign relations in those countries where multi-year funded compacts and threshold programs exist and are being developed. The *MCC Personnel during a Lapse in Appropriations* Section below provides a detailed list of MCC's proposed excepted personnel.

MCC Personnel during a Lapse in Appropriations

1. Senate-confirmed Presidential appointees:

1. MCC's Chief Executive Officer (CEO) (or acting designee)
2. "Private Sector" Members (i.e., the non-ex officio members) of MCC's Board of Directors²

Consistent with OMB and OLC guidance on excepted personnel, MCCs plan includes:

2. 53 personnel excepted up to the duration of the shutdown, including 15 Resident Country Directors (RCDs), 3 Resident Threshold Program Directors, 35 headquarters staff, and 33 on-call personnel (22 headquarters staff and 11 overseas staff), responsible for:
 - a. the safety of human life or the protection of property, including those associated with previously funded multi-year grant programs and assets abroad;
 - b. the performance of "necessarily implied" "excepted activities," including those associated with the continued operation of previously funded multi-year grant programs and assets.

The excepted personnel include:

1. Office of the Chief Executive Officer Staff (4 total staff members) critical to assist in the performance of the CEO's duties, including:
 1. MCC's Chief Executive Officer (CEO) (or acting designee)
 2. Deputy Chief Executive Officer
 3. Chief of Staff
 4. 1 Designated staff member
2. Administration & Finance Department Staff (15 total staff members; 6 on call), including:
 1. Vice President (VP) for Administration & Finance and 2 staff members for administrative guidance and support to multi-year funded programs.
 2. Deputy Chief Financial Officer, Budget Officer, Controller and 1 staff member (on call) for ongoing financial requirements including coordinating activities around the shutdown plan, liaising with OMB on executive branch guidance, ensuring continuation of MCA disbursements, and overseeing excepted shared service activities provided by the Interior Business Center to MCC.

3. Human Resource Managing Director ³ (on call), and 1 staff member for benefits and unemployment administration, and the Overseas Administration Senior Program Officer ⁴ on call for any issues related to overseas personnel
4. Contracts & Grants Management Managing Director to oversee excepted contracts and 1 staff member (on call and rotating within the division, but no more than one excepted at any given time) to provide contract-specific support based on excepted functions.
5. Domestic and International Security Division Managing Director for staff security and public safety and communications assistance with furloughed staff. In addition, the Travel Manager (on call) to ensure the safe return of MCC personnel abroad.
6. Chief Information Officer to ensure continued operation of essential telecommunications systems and oversee excepted IT contractors.
7. Administrative Services Managing Director (on call) for any issues related to property in the headquarters buildings.
3. Office of the General Counsel Staff (6 total staff members; 4 on call), including:
 1. VP and General Counsel, and Deputy VP and Deputy General Counsel to manage and provide counsel with respect to legal, regulatory, and related issues (as well as any Board communications).
 2. 1 administrative law group attorney (rotating within the group, but no more than one excepted at any given time) to provide counsel with respect to legal, regulatory, and related issues on an as needed basis.
 3. 1 Designated Agency Ethics Official (or acting designee) on call for any ethics related matters.
 4. Up to 2 international operations group attorneys (rotating within the group, but no more than two excepted at any given time) to provide counsel with respect to legal, regulatory, and related issues in support of multi-year funded programs on an as needed basis
4. Department of Congressional & Public Affairs Staff (3 total staff members), including:
 1. VP for Congressional & Public Affairs and 2 staff members to manage congressional relations issues and press inquiries during this period.
5. Department of Compact Operations (DCO) Staff (45 total staff members; 22 on call), including:
 1. All 15 RCDs, with 10 DRCDs on call, to help safeguard grant assets in their respective countries (pending State Department concurrence on excepted personnel at overseas missions).
 2. VP for Compact Operations and 8 staff members, including 4 Deputy Vice Presidents, 3 Managing Directors in: DCO front office; Infrastructure, Environment and Private Sector; and Sector Ops; 1 designee from Program Financial Services (on call) and 1 designee for Program Procurement (on call) for the continued operation of multi-year funded compact programs.
 3. 5 Practice Leader/Senior Directors or designees for Infrastructure, Environment and Private Sector (on call) and 5 Practice Leader/Senior Directors or designees for Sector Operations (on call) responsible for approvals of legal, implementation, disbursement, procurement, fiscal, grant, and other requests necessary for the continued operation of multi-year funded programs.
6. Department of Policy & Evaluations Staff (9 total staff members), including:
 1. All 3 Resident Threshold Program Directors and 1 Deputy Threshold Program Resident Director on call to help safeguard grant assets in their respective countries

- (pending State Department concurrence on excepted personnel at overseas missions).
2. VP for Policy & Evaluation, the Deputy VP and 3 staff members to address international policy issues involving compact or threshold countries.

Recall of Staff and Start-up Activities

In addition to the staff listed in this shutdown plan, MCC may recall additional employee(s) during the duration of the lapse in appropriations, as necessary, but for only the time required to address excepted processes described in this document or otherwise in accordance with the provisions of the ADA and relevant guidance. MCC anticipates limited use of such staff, but recognizes from prior experience that additional staffing (particularly in the HR area) may be required as the lapse in funding concludes in order to recall furloughed employees and resume normal agency operations.

Endnotes

1. See OMB Circular A-11, Section 124, Agency Operations in the Absence of Appropriations.
2. Public Sector Board Members will be covered by their agencies' plans. MCC will designate the private sector board members as excepted in the event the board is required to vote on a matter.
3. The HR Managing Director will also be on-call for "excepted" HR activities (as established by OMB or OPM guidance), as well as for "start-up" activities when the lapse in appropriations is expected to end.
4. In addition to the Overseas Administration Senior Program Officer, the Executive Assistant or other staff person designated/trained to send overseas cables will also be "excepted" for the brief and exclusive purpose of transmitting cables over the restricted State Department network (typically less than 4 hours).